LIFE PUBLISHERS BERHAD

v.

EXQUISITE MERGE (M) SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI AHMAD J
[CIVIL SUIT NO. D5-22-55-94]
27 DECEMBER 1994

CONTRACT: *Contract for the supply of newsprint printing paper - Paper supplied defective as it was not to specification agreed - Claim for damages - Defendant contending agency - Whether defendant personally liable - Application of s. 183(a) Contracts Act 1950.*

The defendant had agreed to supply newsprint printing paper to the plaintiff. The paper supplied was defecctive as it was not to the specification agreed. The plaintiff sued the defendant for damagess and sought to enter summary judgment.

Held:

[1] The defendant's contention that they were merely indenting agents and were only responsible for bringing the buyer and seller together had never been asserted on affidavit. There was no evidence in this case of the defendant contracting out.

[2] In the light of the provisions of s. 183 (a) of the Act and the decision in *Medicon Plastic Industries Sdn. Bhd. v. Syarikat Cosa Sdn. Bhd.*, it was clear that the defendant was personally liable under the contract.

[3] Although the Suprme Court in *Medicon's* case had ruled that there had to be proof of liability with regard to breach of contract and damages, this has been rendered quite unnecessary by paragraph 8 of the statement of claim, which particularised the damages suffered, and the relevant affidavits in support of the application for summary judgment.

[Plaintiff's application for summary judgment granted]

Cases referred to:
Medicon Plastic Industries Sdn. Bhd. v. Syarikat Cosa Sdn. Bhd. [1993] 2 MLJ 416 ***(foll)***
Khemanico Textiles v. Gian Singh & Co. Ltd. [1963] 29 MLJ 360 ***(dist)***
Scott, Sinclair & Co. v. Brown & Co. [1852] 1 Ky. 85 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 183(a)

For the plaintiff - Lambert Rasa-ratnam; M/s. Lee Hishammuddin
For the defendant - Amritpal; M/s. Khatijah Rauf & Co.

JUDGMENT

Haji Abdul Malek bin Haji Ahmad J:

By summons in chambers filed on 24 May 1994, the plaintiff had applied for an order that they be at liberty to enter final judgment against the defendant for the sum of RM211,358.01 together with interest at the rate of 10.25 per cent per annum from 23 November 1993 to the date of full realisation and costs or alternatively for an order that the statement of defence be struck out and judgment be entered in favour of the plaintiff.

Learned Counsel for the plaintiff had submitted that the claim arose from a contract where the defendant had agreed to supply newsprint printing paper but the supply was defective

as it was not to the specification agreed. As a result, the plaintiff had suffered damage to the tune of RM211,358.01 as particularised in para. 8 of the statement of claim. The sole issue raised by the defendant, he said, was one of agency and consequently since the defendant had contracted as agent, there was no personal liability on their part. Learned Counsel had further stated that the relevant contract does not show that the defendant had contracted as agent but even if one accepted the contention that they had contracted as agent, they were not absolved from personal liability and would be liable under s. 183(a) of the Contracts Act 1950 (hereinafter "the Act").

In the relevant contract, the plaintiff had been described as buyer and consignee and the seller was Ekman International Incorporation of Suite 310, 366 North Broadway, Jericho, New York 11753, U.S.A. To support learned Counsel's contention that s. 183(a) of the Act applied, reference had been made to *Medicon Plastic Industries Sdn. Bhd. v. Syarikat Cosa Sdn. Bhd*. [1993] 2 MLJ 416 where the facts, and the principles to be applied, appear to be somewhat similar. The facts there were that the plaintiff and the defendant were locally incorporated companies. The plaintiff had purchased certain machines from the defendant for the purpose of making plastic bottles and when the machines arrived from abroad, namely Switzerland, the plaintiff had complained that they were not fit for the purpose for which they were bought and were further defective or were not of merchantable quality. The plaintiff had then sued the defendant. By their defence, the defendant contended that there was no contract between the plaintiff and themselves and that the existence of a contract, if any, was between the plaintiff and the defendant's principal, UHAG Kebersee-Handel Ag Zurich (hereinafter "UHAG"). The trial Judge held that there was no contract in law between the plaintiff and the defendant and that the defendant had merely arranged a contract which was entered into between the plaintiff and UHAG. The defendant was therefore an agent and there was no contract between the defendant and the plaintiff. On appeal by the plaintiff, the Supreme Court had held, in allowing the appeal, that s. 183(a) of the Act meant unmistakably that personal liability will attach to the agent as a matter of statutory presumption when a person is an agent acting on behalf of a principal in respect of a contract with regard to the sale and purchase of goods from a principal who is resident abroad. This presumption of personal liability arises when the above elements are proved. The only way for an agent of a foreign principal to get rid of the personal liability of such an agent would be, either by express words or impliedly, by a necessary inference or implication from documents, evidence and surrounding circumstances, showing that the agent had in fact contracted out of such statutory presumption or such personal liability. There was no such evidence in that case and therefore, s. 183(a) of the Act applied to the defendant and they were bound by or could be sued personally on the contract of sale and purchase of the said machines, subject of course to proof of liability as regards the breach of contract and damages.

Learned Counsel for the defendant had agreed that this was an agency for a foreign principal and that there is a presumption against the agent but he argued that following the principles in *Medicon's* case, the agent can contract out either expressly or by implication from the contract. He had distinguished that case with this case in that the delivery there was made directly to the defendant whereas here it was made direct to the plaintiff who would make payment direct to the principal. The defendant here, he added, was merely an indenting agent, although it is not stated so in the contract, whose duty was merely to bring two parties together, and unlike the present case, there was no contract signed in *Medicon's* case. He further submitted that the defendant did not sign as the seller and the word "through" in the relevant contract indicated that the defendant had contracted out of the responsibility.

Learned Counsel had cited *Khemanico Textiles v. Gian Singh & Co. Ltd.* [1963] 29 MLJ 360 where it was ruled that the plaintiffs as indenting agents were acting on behalf of foreign principals and had no power to contract but simply a sole and exclusive right to obtain orders; and *Scott, Sinclair & Co. v. Brown & Co.* [1852] 1 Ky. 85 where it was held that in the absence of a special agreement, the presumption in the case of foreign merchants is that credit is given to the local agent but that presumption is rebuttable by showing that credit was in fact given to both principal and agent or to the foreign principal only. The fact that the local agent did not communicate to the foreign principal the terms of the contract with the manufacturer and so led the latter to believe that in accordance with the usage in trade credit was exclusively given to the local agent does not alter the foreign principal's liability to the manufacturer, if credit was given to him by the latter.

It is not disputed that the plaintiff had entered into the contract with the defendant on 17 June 1993 for the supply of one hundred and fifty metric tonnes of Abitibi newsprint printing paper. However, the supply delivered to the plaintiff was of a different quality and by fax dated 16 October 1993, the defendant had admitted to the slip-up in the delivery.

The defendant's only issue now is that they were acting as agent and therefore not personally liable. They had stressed on the word "through" in the relevant contract but to my mind, this only emphasises the fact that they are actually only the agent. The question now is whether they are personally liable. The answer must be in the affirmative in view of s. 183(a) of the Act and the decision in *Medicon's* case. It is relevant to reproduce the said s. 183 of the Act in full:

> 183. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.
>
> Such a contract shall be presumed to exist in the following cases:
>
> (a) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;
>
> (b) where the agent does not disclose the name of his principal; and
>
> (c) where the principal, though disclosed, cannot be sued..

In actual fact, learned Counsel for the defendant had conceded that *Medicon's* case applied but contended that the defendant in this case had contracted out of that liability. He had added that they were merely indenting agents and were only responsible for bringing the buyer and seller together citing *Khemanico's* case as a case on point. However, this contention had never been asserted on affidavit and *Khemanico's* case needs to be distinguished as there the agents who are the plaintiffs were not making themselves personally liable and therefore had no *locus standi* in the proceedings. Here, there was no evidence of the defendant contracting out.

Learned Counsel for the defendant had also distinguished *Medicon's* case with the present in that delivery in the former was direct to the defendant from the principal whereas here the principal had delivered directly to the plaintiff. My considered opinion is that to whom the delivery was effected is of no consequence and in fact *Medicon's* case did not even make any distinction on this particular point.

The second point was that there was no contract signed between the parties in *Medicon's* case unlike the situation here. However, a complete reading of that authority shows that there was in fact a contract but it was denied by the defendant. The only similarity in these two cases is that there was no contract between the plaintiff and the principal. As for the

direct payment to the principal by the plaintiff, the situation is the same in both the cases. Clearly, therefore, there are no distinguishing features between *Medicon's* case and this case.

In the event, the defendant must be held to be liable under s. 183(a) of the Act. The Supreme Court in *Medicon's* case had ruled that there had to be proof of liability with regard to breach of contract and damages but this has been rendered quite unnecessary by para. 8 of the statement of claim and the relevant affidavits in support of the application for summary judgment.

In these circumstances, I had accordingly granted the order in terms of the main prayer of the plaintiff's application.